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EPA REGION VIII  
HEARING CLERK

## FINAL ORDER

Docket No. CWA-08-2005-0043

### Respondents.

So ORDERED, this 27<sup>th</sup> day of October, 2005.

Alfred C. Rife

Alfred C. Smith  
Regional Judicial Officer

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY 2005 AUG 11 AM 10:15  
REGION 8

FILED  
EPA REGION VII  
HEARING CLERK

IN THE MATTER OF:

CONSENT AGREEMENT

Patrick K. Goggins  
Vermilion Ranch Co.  
4419 Vermilion Road  
Billings, MT 59105

Docket No. CWA-08-2005-0043  
Simultaneous Commencement and  
Conclusion of a Proceeding Pursuant to  
40 C.F.R. § 22.13(b)

Respondents.

Complainant, United States Environmental Protection Agency ("EPA"), Region 8, and  
Respondents, Patrick K. Goggins and Vermilion Ranch Co., by their undersigned representatives,  
hereby consent and agree as follows:

**I. STATUTORY AUTHORITY**

1. This Consent Agreement ("Agreement") is issued pursuant to section 309(g) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.13. Section 309(g) of the Act authorizes the Administrator of the United States Environmental Protection Agency ("EPA") to make findings and to assess civil penalties for violations of section 301 of the CWA, 33 U.S.C. § 1311. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, governs such proceedings. 40 C.F.R. § 22.13(b) provides that a proceeding subject to the Consolidated Rules may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). Accordingly, this Agreement is entered into under the authority of 40 C.F.R. § 22.13(b), subject

to the issuance of a final order by the Regional Hearing Clerk pursuant to 40 C.F.R. § 22.18(b)(2) and (3). Complainant in this action is the Assistant Regional Administrator for the Office of Enforcement, Compliance, and Environmental Justice, EPA Region 8, who has been properly delegated the authority to issue this Agreement.

## **II. PARTIES BOUND**

2. This Agreement, upon incorporation into a final consent order, shall apply to and be binding upon EPA and shall be binding upon the Respondents, their officers, directors, agents, successors, and assigns. Any change in the ownership or legal status of Vermilion Ranch Co. or corporate organization structure or status of Vermilion Ranch Co. including, but not limited to, any transfer of assets or real or personal property shall not alter its responsibilities under this Agreement.

## **III. STATEMENT OF PARTIES**

3. Respondents stipulate to EPA's jurisdiction and venue over the matters contained in this Agreement; however, Respondents neither admit nor deny the specific factual allegations contained herein except those contained in paragraph 15.

4. Respondents waive their right to a hearing before any tribunal to contest any issue of law or fact set forth in this Agreement.

5. The signatories to this Agreement certify that they are authorized to execute and legally bind the parties they represent to this Agreement.

6. This Consent Agreement contains all terms of the settlement agreed to by the parties.

7. EPA and Respondents agree that settlement of this matter is in the public interest, and that execution of this Consent Agreement and issuance of a Final Order without further

litigation and without adjudication of any issue of fact or law, is the most appropriate means of resolving this matter.

#### **IV. STATUTORY AND REGULATORY FRAMEWORK**

8. Section 301(a) of the Act, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of any pollutant by any person into waters of the United States except as in compliance with section 404 of the Act, 33 U.S.C. § 1344.

9. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the United States Army Corps of Engineers (“Corps”), to issue permits for the discharge of dredged or fill material into navigable waters which are defined as waters of the United States.

10. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

11. The term “fill material” is defined in 33 C.F.R. § 323.3(e)(1) as “material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.3(2) sets forth examples of fill material which include “rock, sand, soil, clay, plastics, construction debris, wood chips . . . .”

12. “Discharge of fill material” is defined, in pertinent part, in 33 C.F.R. § 323.3(f) as “the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: . . . property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments . . . .”

13. The term “person” is defined in section 502(5) of the Act as “an individual,

corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

14. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19 authorize the assessment of a Class II civil penalty of up to \$11,000 per day for each violation of section 301 of the Act, 33 U.S.C. § 1311, up to a maximum of \$157,500.

#### **V. GENERAL ALLEGATIONS**

15. Respondent Patrick K. Goggins is an individual residing in or near Billings, Montana and the president of Vermilion Ranch Co. At all relevant times, Respondent Vermilion Ranch Co. was a corporation organized under the laws of the State of Montana. The Vermilion Ranch Co. has offices at P.O. Box 30758, Billings, Montana, 59107.

16. At all relevant times, Respondents owned, controlled, and/or operated property located in Section 16, Township 10 North, Range 49 East, in Custer County, approximately 24 miles east of Miles City, Montana (the “Site”). The Site is located within the boundaries of a tract of land known as the Diamond Ring Ranch.

17. At all relevant times, Respondents were “persons” within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

18. Pursuant to section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA has provided the State of Montana Department of Environmental Quality, at least forty (40) days prior to the issuance of the Final Order in this matter, notice of its opportunity to consult with EPA concerning this action.

#### **VI. VIOLATION**

19. During or around September and October of 2002, Respondents discharged or caused to be discharged fill material into Cottonwood Creek and into wetlands located adjacent

to Cottonwood Creek at the Site. The fill material was discharged to accommodate a center pivot irrigation system and to create farmable acreage that would be irrigated with the center pivot system.

20. On or about August 27, 2003, the United States Army Corps of Engineers ("Corps") contacted Mr. Greg Roberts, manager of the Diamond Ring Ranch, and conducted a field investigation at the Site. The Corps observed that fill material had been discharged into Cottonwood Creek and its adjacent wetlands as stated in paragraph 19 of this Agreement, and also observed that a new irrigation pump had been installed in the Yellowstone River, extending approximately 50 feet into the river. On September 16, 2003, the Corps issued a Notice of Violation to Mr. Patrick K. Goggins for the unauthorized wetland fill and the unauthorized placement of the irrigation pump in the Yellowstone River.

21. On or about July 21, 2004, the Natural Resources Conservation Service ("NRCS") inspected the Site and confirmed the discharge of fill into Cottonwood Creek and its adjacent wetlands described in paragraph 19 of this Agreement. The NRCS found that Respondents had filled approximately 2.3 acres of wetlands at the Site.

22. The discharge referred to in paragraph 19 of this Agreement was performed without prior authorization from the Corps.

23. Cottonwood Creek is tributary to the Yellowstone River. The Yellowstone River is tributary to the Missouri River. The Yellowstone and Missouri Rivers are, and were at all relevant times, navigable, interstate waters.

24. The activities described in paragraphs 19, 20 and 21 of this Agreement were performed using common earthmoving vehicles, including a 1969 D7E Cat, a 1972 D7F Cat, a 1997 320 CL Cathoe, and a 1967 International dump truck operated by J & J Scanlan

Construction; a Barber Green Wheel Trencher operated by Agri-Industries; and a John Deere 8400 tractor with a John Deere disc ripper operated by Respondents; all of which were operated by Respondents and/or by one or more individuals on behalf of Respondents.

25. The discharged fill materials described in paragraphs 19, 20 and 21 of this Agreement are, and were at all relevant times, "fill material" within the meaning of 33 C.F.R. § 323.2(e) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

26. The vehicles referenced in paragraph 24 of this Agreement are each a "point source" within the meaning of the definition set forth in section 502(14) of the Act, 33 U.S.C. § 1362(14).

27. Respondents' activities as described in paragraphs 19, 20 and 21 of this Agreement, constitute the "discharge of a pollutant" within the meaning of the definition set forth in section 502(12) of the Act, 33 U.S.C. § 1362(12).

28. Cottonwood Creek and its adjacent wetlands are and were, at all relevant times, "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

29. Respondents neither applied for nor received a section 404 permit from the Corps authorizing the discharges of dredged or fill material described in paragraphs 19, 20 and 21 of this Agreement, prior to their discharge, as required under sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

30. The discharges of pollutants from a point source by Respondents into waters of the United States without the required permit issued by the Corps pursuant to section 404 of the Act, 33 U.S.C. § 1344, constitute violations of sections 301 and 404 of the Act, 33 U.S.C. §§

1311 and 1344. Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

## **VII. PAYMENT OF CIVIL PENALTY**

31. Respondents consent and agree to pay a civil penalty in the amount of Thirty-One Thousand Eight Hundred One dollars (\$31,801.00).

32. The civil penalty set forth in paragraph 31 of this Agreement was determined by EPA after taking into account all factors identified in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g). These factors include: the nature, circumstances, extent and gravity of the violation or violations; Respondents' prior compliance history and degree of culpability for the cited violations; any economic benefit or savings accruing to Respondents by virtue of the violations; Respondents' ability to pay the proposed penalty, and other matters as justice may require.

33. Respondents shall pay the penalty specified in paragraph 31 of this Agreement within thirty (30) calendar days of receipt of the Agreement and Final Order issued by the Regional Judicial Officer approving this Agreement. Payment shall be made by certified or cashier's check payable to "Treasurer, United States of America," and remitted to:

U.S. Environmental Protection Agency, Region 8  
Regional Hearing Clerk  
P.O. Box 360859  
Pittsburgh, PA 15251

A transmittal letter identifying the case title and docket number must accompany payment and copies of the transmittal letter and check shall be sent to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 8 (8RC)  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

and



Kristine Knutson  
U.S. Environmental Protection Agency  
Region 8, Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, MT 59626-0096

and

Sheldon Muller (8ENF-L)  
U.S. Environmental Protection Agency, Region 8  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

and

Financial Management Officer  
U.S. Environmental Protection Agency, Region 8 (8TMS-F)  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

34. In the event payment of the civil penalty is not received on or before the due date, interest, penalty charges and administrative costs will be assessed in accordance with EPA's Claims Collection Standards, Title 40 C.F.R. Part 13, in effect as of the date the Final Order is issued in this matter, except that interest shall accrue commencing on the civil penalty due date as specified in 31 C.F.R. § 901.9. Consistent with 40 C.F.R. § 13.11, administrative costs will be assessed at the rate of Fifteen dollars (\$15.00) for each thirty (30) day period that the payment of the civil penalty, or any portion thereof, is late and a penalty charge of 6% per annum will be assessed monthly on any principal amount not paid within 90 days of the civil penalty due date.

35. Respondents agree that the civil penalty shall never be claimed as a federal, state or other tax deduction or credit.

36. Respondents' payment of the civil penalty shall not affect Respondents' continuing obligation to comply with the Clean Water Act, any other federal, state, or local law or regulations, and the Administrative Order for Compliance (EPA Docket No. CWA-08-2004-

0074) previously issued in this matter.

#### **VIII. PUBLIC NOTICE**

37. As required pursuant to section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), EPA will provide public notice and a reasonable opportunity to comment on the penalty that Respondents have agreed to pay in this matter. EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that the Agreement is inappropriate, improper, or inadequate.

38. If comments received during the public comment period do not require modification or withdrawal by EPA from this Agreement, the parties agree to submit this Agreement to the Regional Judicial Officer for Region 8 following closure of the public comment period and the period for state consultation specified in 40 C.F.R. § 22.38(b), with a request that it be incorporated into a Final Order.

#### **IX. OTHER TERMS AND CONDITIONS**

39. Failure by Respondents to comply with any of the terms of this Agreement shall constitute a breach of the agreement and may result in referral of the matter to the United States Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

40. Nothing in this Agreement shall be construed as a waiver by EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondents' failure to perform pursuant to the terms of this Agreement.

41. This Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the

civil penalty owed for violations alleged in this Agreement.

42. This Agreement resolves Respondents' liability for Federal civil penalties under sections 309(d) and 309(g) of the Act, 33 U.S.C. §§ 1319(d) and (g), for the alleged violations and facts contained in this Agreement. This Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law whether or not alleged in this Agreement. This Agreement shall not affect Respondents' right to assert any defense in any action by EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

43. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Agreement.

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8**  
Complainant.

Date: August 2, 2005

*for* Eddie A. Sierra  
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice

**VERMILION RANCH CO.**  
Respondent

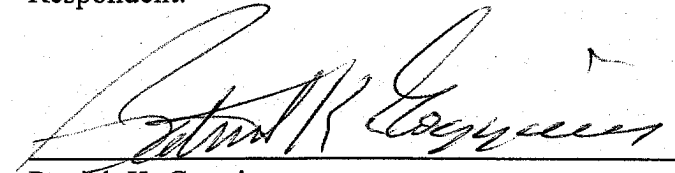
Date: July 25/05

Patrick K. Goggins  
Patrick K. Goggins  
President

**PATRICK K. GOGGINS**  
Respondent.

Date:

July 27/05

  
Patrick K. Goggins

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENTS** in the matter of **PATRICK K. GOGGINS, VERMILION RANCH CO., AND DIAMOND RING RANCHES, DOCKET NOS.: CWA-08-2005-0043 AND CWA-08-2005-0044** was filed with the Regional Hearing Clerk on August 11, 2005 and the **FINAL ORDERS** were filed on October 7, 2005.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to Sheldon Muller, Enforcement Attorney, U.S. EPA - Region 8, 999 18th Street - Suite 300, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt on October 7, 2005 to:

Mr. Patrick K. Goggins  
Vermilion Ranch Co.  
Box 30758  
Billings, MT 59107

October 7, 2005



Tina Artemis  
Regional Hearing Clerk